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Supreme Court, U.S.
FILED
APR 8 2001
CLERK

No. 00-1584

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

WILLIAM SEABOLD, PETITIONER,

V.

DEAN VINCENT, RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Dean Vincent, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39. The petitioner was permitted to proceed as an indigent by the Supreme Court of Kentucky. The petitioner's affidavit is attached.

Respectfully submitted,

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COUNSEL OF RECORD

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WILLIAM SEABOLD, PETITIONER,

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DEAN VINCENT, RESPONDENT.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Dean Vincent, being first duly sworn, depose and say that I am the respondent in the above-styled case, and in support of my motion to proceed without being required to prepay fees, costs, or giving security, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security. I believe I am entitled to redress.

I further swear the responses I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting this proceeding are true.

1. Are you presently employed? Yes ( ) No (X)

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state 1) the date of your last employment and 2) the amount of the salary and wages per month which you received.

D.R.C.C. #1.25 PER DAY / 2/22/01

2. Have you received within the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

N/A

3. Do you own any cash or checking or savings accounts?

NO

4. Do you own any real estate, stocks, bond, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Wife, child

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dean Vincent

Dean Vincent

SUBSCRIBED AND SWORN TO ME BY DEAN VINCENT ON THIS 30TH day of March, 2001.

Janice L Markham

Notary Public

MY COMMISSION EXPIRES 3/22/2004

My Commission Expires: _____

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WILLIAM SEABOLD, PETITIONER,

V.

DEAN VINCENT, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Dean Vincent, respectfully prays this Court to deny a writ of certiorari in this case to review the published Sixth Circuit decision in *Vincent v. Seabold*, 226 F.3d 681 (6th Cir. 2000), rehearing and suggestion for rehearing en banc denied December 12, 2000.

COUNTER-STATEMENT OF THE CASE

The government has misstated the facts. The government says Mr. Kinser's statement was "extensively edited" for presentation at Mr. Vincent's retrial, and that Mr. Kinser "makes no attempt whatsoever to distance himself from the murder." (Cert. Petition, p. 6). This is untrue. The record demonstrates that even as edited, Kinser's statement *extensively* incriminated Mr. Vincent, and tended *extensively* to shift blame away from Mr. Kinser and spread it on Mr. Vincent. (APX 187-197) See also the Sixth Circuit opnion, which summarizes the facts correctly as follows:

> Kinser told Gaddie the following: He, Vincent, and Johnson broke into the home of Harold Hayes, finding Hayes asleep on the couch. Vincent approached Hayes and struck him twice in the head with a billy club and began to search the house for money. Johnson kicked Hayes and then began to use duct tape to constrain him. Vincent returned to the room and began interrogating Hayes about the whereabouts of some money that defendants believed was in the house. Vincent again struck Hayes with the club three or four more times before continuing his search. All the while, Kinser was searching the house for the money. Vincent then yelled to the others that "he'd found it" and returned to the room with a sack of money. Johnson then taped shut Hayes's eyes and mouth, and the three defendants left the house. Id., 685-686.

The Sixth Circuit held correctly in *Vincent* that "[a]ll of these statements attempt to distance Kinser from the murder and minimize his participation in the crime; Kinser clearly was attempting to shift the blame away from himself and onto Vincent and Johnson." Id., 689.

REASONS FOR DENYING THE WRIT

A) The standard for reviewing habeas petitions remains an objective one.

The government argues 18 U.S.C. §2254(d) was "amended in 1996 to provide for a more deferential standard of review for constitutional error in state court proceedings...." (Cert. Petition pp. 4-5) However, in *Williams v. Taylor*, 120 S.Ct. 1495 (2000) this Court held the test for whether a state court has unreasonably applied clearly established United States Supreme Court law has not changed under the AEDPA and remains an objective one. The Sixth Circuit has correctly applied the standard, which is satisfied by either an unreasonable application of the correct legal rule, or a conclusion opposite that reached by the U. S. Supreme Court on identical facts.

B) *Lilly* relies entirely on established U.S. Supreme Court holdings.

Lilly v. United States, 119 S.Ct. 1887, 527 U. S. 116 (1999) was decided after Vincent's direct appeal became final, and the government argues therefore it does not apply to Vincent's

habeas proceeding. The government argues there is a conflict with *Williams v. Taylor*, 120 S.Ct. 1495 (2000) in that *Williams* calls for reliance on holdings, not dicta, and *Lilly* is a mere plurality opinion.

Both arguments are red herrings. It simply doesn't matter whether the *Lilly* opinion is a majority or plurality, or when *Lilly* was decided, because *Lilly* did not make new law relative to Vincent's case, and all the legal points in Vincent's case are fully supported by U. S. Supreme Court holdings relied on in *Lilly* but decided before Vincent's direct appeal was final.[1] Nor does the fact that *Lilly* may have reconciled a circuit split make *Lilly* new law. In fact *Lilly* must be applied retroactively to Vincent's case because the result in *Lilly* was "dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288 (1989).

The only thing "new" that *Lilly* did was to gather together in one place several *Bruton*[2] principles from other U. S. Supreme Court cases. "In the years since *Bruton* was decided," this Court has "reviewed a number of cases in which one defendant's confession has been introduced into evidence in a joint trial pursuant to instructions that it could be used against him but not against his codefendant." *Lilly*, *supra*, at 128. In all of those cases, this Court has "consistently either stated or assumed that the mere fact that one accomplices's confession qualified as a statement against his penal interest did not justify its use as evidence against another person."

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[1] Vincent's direct appeal was final on September 27, 1995. This was 90 days after June 29, 1995, the date Vincent's direct appeal became final under state law. Under Ky. R. Civ. Pro. 76.30(2)(a) Vincent's direct appeal was final under Kentucky law on the 21st day after it was rendered, i.e., on June 29, 1995 (21 days after June 8, 1995). APX 70-96.

[2] *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)

Lilly, at 128, citing, *inter alia, Richardson v. Marsh*, 481 U.S. 200, 206 (1987); and *Cruz v. New York*, 481 U.S. 186, 189-90 (1987). "It is clear that [United States Supreme Court] cases consistently have viewed an accomplices's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those 'hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability.'" *Lilly* at 134.

For each significant point of law *Lilly* supports in *Vincent*, *Lilly* relies on majority opinions in much earlier U. S. Supreme Court opinions: on *Richardson v. Marsh, Cruz v, New York, supra; on Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); on *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); and on *White v. Illinois*, 502 U.S. 346, 357, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). *Lilly* is entirely based on firmly established U.S. Supreme Court holdings which were rendered either before the events in Vincent's case, or at least before September 27, 1995, when his direct appeal was final for purposes of federal habeas analysis.

The Court in *Lilly* held that accomplice statements that shift or spread blame are not within a firmly rooted exception to the hearsay rule, but for this holding relied on *White v. Illinois*, 502 U.S. 346, 357, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

The *Lilly* Court found the Virginia Supreme Court failed to analyze the confession under the second prong of *Ohio v. Roberts*, and simply remanded the case for Virginia to demonstrate compliance with *Ohio v. Roberts*, by demonstrating that the confession bore "particularized guarantees of trustworthiness," and, if none could be demonstrated, then to determine whether the lack of such guarantees was harmless error.

In *Lee v. Illinois*, the Court found in even earlier cases the basis for a very formidable

obstacle to the use of such statements as evidence, which was applied in Vincent's case:

> [A] codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Lee v. Illinois*, 476 U.S. 530, 545.

In deciding *Lee*, this Court relied on the "indicia of reliability" standard of *Ohio v. Roberts* (also relied on in *Lilly*) a standard which has been described as the "cornerstone of the constitutional prerequisites for admitting into evidence against a defendant the confession of a nontestifying codefendant." Kentucky Evidence Law Handbook, Robert G. Lawson, §11.20, p. 621. In *Lee* this Court held that to overcome the presumption of unreliability established in *Lee*, the independent indicia of reliability must be more than a mere claim that the confession is a declaration against penal interest. Id., at 544, n. 5. In *Lee* the Court found that neither the circumstances nor the fact the confessions interlocked was sufficient to overcome the presumption. Id., at 546. This was not new law. The interlock in *Lee* was found insufficient for the same reason the district court below found it to be insufficient in Vincent's case: because of major discrepancies between the two confessions as to the very issues in dispute at trial. And "when the discrepancies between the statements are not insignificant, the codefendant's statement may not be admitted." Id., at 545.

Lee suggested evidence corroborating truth of the hearsay could provide indicia of reliability, but *Idaho v. Wright*, 497 U.S. 805, 817, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) (also relied on by *Lilly*, 119 S.Ct. at 1895) held that indicia of reliability must be found in the "inherent trustworthiness" of the hearsay rather than by virtue of other evidence produced at trial.

To sum up, *Lilly* adds nothing to *Lee*, *White*, *Roberts*, and *Wright, etc.* that is essential to

support the holding in *Vincent*. The Sixth Circuit in Vincent's case could have reached the same conclusion without reference to *Lilly*, but by relying entirely on *Williamson* and other U.S. Supreme Court holdings established prior to September 27, 1995, the date Vincent's direct appeal was final.

As demonstrated above, dissection of the *Lilly* decision and review of its legal underpinnings reveal that "reasonable jurists hearing [Vincent's] claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor. *Graham v. Collins*, 506 U.S. 461, 467 (1993). Cases from the Sixth Circuit, such as *Gilliam v. Mitchell*, 179 F.3d 990, 994 (6th Cir. 1999) and *Neuman v. Rivers*, 125 F.3d 315, 319-320 (6th Cir. 1997), cited by Seabold, are irrelevant since "clearly established federal law" in the federal habeas context emanates only from the decisions of the United States Supreme Court. (Cert. Petition, p. 9.) "The one caveat, as the statutory language makes clear is that [Sec.] 2254(d)(1) restricts the source of clearly established law to [the United States Supreme Court's] jurisprudence." *Williams* at 1523.

The holding in *Lilly* does not constitute a "new rule" within the meaning of *Teague*, or of 2254(d). *Graham v. Collins* at 467. Faced with facts materially indistinguishable from the facts in *Williamson*, the Kentucky Supreme Court found that Vincent's co-defendant Kinser made no effort to distance himself from the murder or minimize his participation in the crime. This finding was opposite and thus "contrary to" the holding in *Williamson*. Likewise, Kentucky's holding that accomplice confessions that inculpate a criminal defendant are within a firmly rooted exception to the hearsay rule directly violates U. S. Supreme Court precedent relied on in *Lilly*, including the need to show adequate "indicia of reliability" as required under *Ohio v.*

Roberts, supra.

C) There is no misapplication of *Williamson v. United States.*

In *Williamson v. United States*, 512, U.S. 594, 114 S.Ct. 2431 (1994) this Court held that the exception to the hearsay rule for statements against penal interest does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The government concedes that *Williamson,* one of the primary underpinnings of Vincent's federal district court opinion, is clearly established federal law pursuant to 28 U.S.C. §2254(d), and yet argues it cannot apply to Vincent's case because Vincent's case involved a purely state-law interpretation of a state evidence law. According to the Commonwealth, *Williamson* applies only to interpret federal law, i.e., Fed. R. Evid. 804. (Cert. Petition, pp. 10-11)

The government is correct that a state supreme court ruling on a state law hearsay exception is assumed to be correct. However, this begs the real question, whether the hearsay statements in Vincent's case fall within a firmly rooted hearsay exception for federal Confrontation Clause purposes. The latter inquiry is purely a question of federal law. See, e.g., *Taylor v. United States*, 110 S.Ct. 2143, 2154, 495 U.S. 575 (1990). See also *Williams v. Taylor*, 120 S.Ct. 1495, 1511 (2000) (reaffirming that while a federal habeas court must defer to state court interpretation of state law,18 U.S.C. §2254(d) does not require federal courts "to defer to the opinion of every reasonable state-court judge on the content of federal law").

In Vincent's case Kentucky interpreted its own evidentiary rule KRE 804 and found it was in accord with Kentucky law. However, the Kentucky Supreme Court did not analyze or determine whether KRE 804, as interpreted, violates the federal Confrontation Clause and 18

U.S.C. §2254(d). Its failure to do so was unreasonable, because in all criminal prosecutions, state and federal, the accused has a right guaranteed by the 6th and 14th Amendments of the U. S. Constitution, "to be confronted with the witnesses against him." Seabold's assertion that the Kentucky Supreme Court in applying KRE 804(b)(3) to Vincent's case was "not required to adhere to the Federal Rules of Evidence," is irrelevant to the completely proper federal constitutional analysis undertaken by the Sixth Circuit. (Cert. Petition, p. 11).

Vincent had a right to federal court review for compliance with federal law, the federal constitution, and longstanding U. S. Supreme Court precedent, including *Williamson v. United States* and (as discussed above) cases relied on by the Court in *Lilly*. In determining whether the admission against penal interest exception to the hearsay rule, as applied in Vincent's case, is a firmly rooted hearsay exception, the Sixth Circuit had not only the right but the obligation to factor in the teachings of both *Williamson* and *Lilly*.

CONCLUSION

The government's petition for certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Donna Boyce, a member of the Bar of this Court, hereby certify that on this 3rd day of April, 2001, three copies of the Brief in Opposition to the Petition for Writ of Certiorari in the above-styled case were mailed, first class postage prepaid, to Hon. Kent T. Young, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601, Counsel For Petitioner. I further certify that all parties required by Rule 28 to be served have been served.

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